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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 82

SERGEANT HERBERT N. CARRINGTON,

Petitioner

vs.

ALAN V. RASH, *et al.*,

Respondents

On Writ of Certiorari to the Supreme Court of the State of Texas

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BRIEF FOR RESPONDENT WAGGONER CARR, ATTORNEY GENERAL OF TEXAS

Question Presented

The question for decision, as stated by Petitioner, is:

> "Does the provision of the Texas Constitution which prevents persons in the military service from acquiring a voting residence in the county in which they are bona fide legal residents for all other purposes constitute such discrimination against persons in the military service as to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?"

Summary of Argument

I. The framers and adopters of the Fourteenth Amendment did not intend for it to apply to a state's

power to prescribe the qualifications of voters and to grant or withhold the privilege of suffrage as it sees fit. Mr. Justice Harlan's dissenting opinion in *Reynolds v. Sims,* 12 L.Ed. 2d 543, 84 S.Ct. 1395, presents irrefutable documentation of this intent. The scope of the Amendment was fixed by the intent of its adopters, and remains the same today as when adopted.

II. The state constitution under which Texas was readmitted to the Union in 1870 contained a provision that "no soldier, seaman, or marine, in the army or navy of the United States, shall be entitled to vote at any election created by this Constitution." The Texas Readmission Act approved March 30, 1870 (16 Stat. 80) contained provisions which clearly demonstrate that Congress had scrutinized the franchise provisions of the Texas constitution and were satisfied that this disfranchisement did not violate the United States Constitution. This contemporaneous construction by the Congress is entitled to great weight in determining the scope and meaning of the Fourteenth Amendment, and shows that the Equal Protection Clause, when adopted, was either not intended to apply to state franchise provisions or, if applying, was not intended to invalidate a provision such as we have in this case.

III-A. Voting is a privilege and not a right. It is not a privilege given by the Federal Constitution or springing from citizenship of the United States, and the power of each state to determine who shall constitute its electorate is subject only to specific restrictions in the United States Constitution. If the Equal Protection Clause is applicable to this privilege, a state law making special suffrage regulations for a certain class of its residents will be upheld if the classification

rests on real and substantial differences and reasonably promotes some proper object of public welfare or interest, and the constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective.

III-B. The purpose of the restriction on place of voting by military personnel is to prevent a concentration of military voting strength in areas where military bases are located. Such a concentration would pose two possibilities which the State of Texas deems to be inimical to the public welfare; *first,* that the control of community affairs might be dominated by the military, through pressure or persuasion of commanding officers or through concerted action of the class as a result of the cohesion which exists among the members of a military organization; *second,* that the balance of power in community affairs might rest with a group whose members are, in the final analysis, only temporary residents of the place where they are stationed and who might lack a proper understanding of local problems and a proper concern for the best interests of the community. Characteristics of military service make these possibilities more likely to occur in the case of military voters than in the case of civilian voters. The public policy which seeks to prevent these occurrences is in promotion of a proper object of public welfare.

III-C. The restriction on place of voting is not a denial of voting rights. Every state in the Union permits its residents who are in military service to retain their residence throughout service, no matter how long their absence from the state may be. Further, every state has laws permitting servicemen to vote absentee. A serviceman stationed in Texas loses voting privi-

leges only by voluntarily choosing to establish a new residence at the place where he is stationed. It would be within the power of the state to deny to persons in military service the power to establish a new residence during service, and it follows that if a state does permit servicemen to establish residence, it may regulate the privileges which attach to the residence so established.

III-D. Petitioner contends that the classification is invalid because the restriction does not include civilians whose occupations make them highly mobile, such as construction workers. Respondent's answer to this contention is that there are substantial distinguishing characteristics between the two groups, and, further, that a classification is not rendered invalid by failure to cover "the whole field of possible abuses."

III-E. Petitioner asserts an intent to maintain his domicile permanently at the place of his present residence, throughout the remainder of his military career and after retirement from service, and rests his claim of impermissible discrimination on the special circumstances of his case. The intent to remain permanently at the place where he has established a new residence while stationed there is not typical of persons in military service. Respondent takes the position that the restriction on place of voting is not unreasonable as applied to Petitioner individually, and, further, that the classification is not rendered invalid by reason of the fact that isolated cases of inequity may arise under it.

ARGUMENT

I. Inapplicability of the Equal Protection Clause of the Fourteenth Amendment

Petitioner attacks the validity of the following pro-

vision in Artiele VI, Section 2 of the Constitution of Texas:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

The sole ground of attack is that the provision violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

This case was argued in the lower court on April 22, 1964. Respondent's brief in opposition to the petition for writ of certiorari was filed on June 13, 1964, two days before rendition of Mr. Justice Harlan's dissenting opinion in *Reynolds v. Sims* and its companion cases (12 L.Ed.2d 543, 84 S.Ct. 1395), in which he presented what to us is incontrovertible evidence that the Equal Protection Clause of the Fourteenth Amendment does not apply to suffrage. In argument before the Supreme Court of Texas, counsel for Respondent expressed grave doubt that the framers and adopters of the Amendment intended it to apply to suffrage, but lacked the historical evidence to clinch the matter; and in view of the decisions, beginning with *Nixon v. Herndon,* 273 U.S. 536 (1927), in which this Court had applied the Equal Protection Clause to suffrage questions, the point was not pressed in Respondent's brief in opposition to the petition for certiorari.

The evidence presented in Section I, Subsections A, B, and E of Mr. Justice Harlan's dissent points up the need for critical re-examination of prior opinions by this Court which have decided questions of voting

rights on the basis of the Equal Protection Clause. His discussion is directed toward inapplicability of the Amendment as a limitation on the power of the states to apportion their legislatures as they see fit, but the material he presents also goes to its applicability as a limitation on the power of the states to grant or withhold the privilege of voting as they see fit.

For a considerable number of years after the Fourteenth Amendment was adopted, the Court clearly treated it as inapplicable to questions of suffrage. *Minor v. Happersett,* 21 Wall. (88 U.S.) 162 (1875), in refusing to invalidate a state statute excluding women from suffrage, held directly that the statute did not violate the Privileges and Immunities Clause of the Fourteenth Amendment inasmuch as suffrage was not one of the privileges of United States citizenship. The reasoning of the opinion, as well as the judgment of the Court, demonstrated also that the Court did not consider the Equal Protection Clause to have been involved, and the fact that amendment of the Constitution was deemed necessary to secure voting rights for women confirms that this was the prevailing view throughout the woman suffrage movement which culminated in submission of the Nineteenth Amendment.

Parenthetically, if the Court which decided *Minor v. Happersett* thought the Equal Protection Clause did apply to suffrage, then that case is clear authority against Petitioner's contention, since, we submit, there is far more substantial basis for classifying the military separately from the civilian citizens than for classifying the female separately from the male citizens.

Other early cases also made it clear that the Court did not consider the Fourteenth Amendment as affect-

ing suffrage—protection of suffrage was the function of the Fifteenth Amendment. See *Slaughter-House Cases*, 16 Wall. (83 U.S.) 36, 71 (1873). Disregarding the teachings of these cases, the Supreme Court held in *Nixon v. Herndon, supra*, that it was unnecessary to consider whether a Texas statute barring Negroes from voting in the Democratic primary violated the Fifteenth Amendment because it was "an obvious infringement" of the Equal Protection Clause of the Fourteenth Amendment.[1] Other subsequent cases have also applied the Fourteenth Amendment to voting rights, e.g., *Smith v. Allwright*, 321 U.S. 649 (1944); *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959). However, every case we have found which has invalidated a state voting law under the Fourteenth Amendment could have been decided—and, we submit, should have been decided—under the Fifteenth Amendment.

We submit that, in the light of the indisputable conclusion which must be drawn from the historical material presented in Mr. Justice Harlan's opinion, it is time for a re-examination of the cases holding that the Equal Protection Clause applies to suffrage. We now ask the Court to make that re-examination and to affirm the judgment of the lower court on the ground that it reaches the correct result in holding that the state law does not violate the Fourteenth Amendment.

II. Contemporaneous Construction of the Fourteenth Amendment

From 1837, when Texas was a newly-founded repub-

[1] So far as we have found, the first intimation that the Equal Protection Clause might apply was in *Pope v. Williams*, 193 U.S. 621 (1904).

lic, until amendment of the State Constitution in 1954, the laws of Texas disfranchised part or all of its residents who were in military service. If total denial of voting privileges did not violate the Fourteenth Amendment, it would necessarily follow that the present restriction also is not invalid on that ground. The purpose of this section of our brief is to show that the Congress of the United States in 1870 interpreted this complete disfranchisement as not violating the Fourteenth Amendment; that this contemporaneous construction would be entitled to great persuasive weight in a determination of its validity; and that validity of the former provision would encompass validity of the present restriction on place of voting.

The Fourteenth Amendment was proposed to the legislatures of the several states on June 16, 1866, and proclamation of its ratification was issued on July 28, 1868. On November 30, 1869, the people of Texas ratified a new constitution which had been proposed by a constitutional convention convened under the Reconstruction Acts of Congress passed March 2, 1867 and Acts supplemental thereto, with the express view of seeking readmission to the Union. This Constitution of 1869 contained the following provisions under Article III, entitled Legislative Department:

> "Section 1. Every male person who shall have attained the age of twenty-one years, and who shall be (or who shall have declared his intention to become) a citizen of the United States, or who is, at the time of the acceptance of this Constitution by the Congress of the United States, a citizen of Texas, and shall have resided in this State one year next preceding an election, and the last six months within the district or county in which he offers to vote, and is duly registered (Indians not

taxed excepted) shall be deemed a qualified elector; and should such qualified elector happen to be in any other county, situated in the district in which he resides, at the time of an election, he shall be permitted to vote for any district officer: Provided, that the qualified electors shall be permitted to vote anywhere in the State for State officers; And provided further, that *no soldier, seaman, or marine, in the army or navy of the United States, shall be entitled to vote at any election created by this Constitution.*" (Emphasis supplied.)

Section 1 of Article VI, entitled Right of Suffrage, read:

"Section 1. Every male citizen of the United States, of the age of twenty-one years and upwards, *not laboring under the disabilities named in this Constitution,* without distinction of race, color, or former condition, who shall be a resident of the State at the time of the adoption of this Constitution, or who shall thereafter reside in this State one year, and in the county in which he offers to vote sixty days next preceding an election, shall be entitled to vote for all officers that are now or hereafter may be elected by the people, and upon all questions submitted to the electors at any election; Provided, that no person shall be allowed to vote, or hold office, who is now, or hereafter may be, disqualified therefor, by the Constitution of the United States, until such disqualification shall be removed by the Congress of the United States: Provided further, that no person, while kept in any asylum, or confined in prison, or who has been convicted of a felony, or who is of unsound mind, shall be allowed to vote or hold office." (Emphasis supplied.)

Texas was readmitted to the Union by an Act of Congress approved March 30, 1870 (16 Stat. 80). The preamble of this Act read:

"Whereas, The people of Texas have framed and adopted a constitution of State government which is republican; and whereas the Legislature of Texas, elected under said constitution, has ratified the fourteenth and fifteenth amendments to the Constitution of the United States; and whereas the performance of these several acts in good faith is a condition precedent to the representation of the State in Congress: Therefore, Be it enacted * * *"

The Act contained the following proviso:

"* * * And provided further, That the State of Texas is admitted to representation in Congress as one of the States of the Union, upon the following fundamental conditions: First, That the Constitution of Texas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote, who are entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: Provided, That any alteration of said constitution, prospective in its effects, may be made in regard to the time and place of residence of voters. * * *."

The provisos inserted in the Texas Readmission Act make it clear that Congress scrutinized with great care the suffrage clauses of the constitution under which Texas was readmitted. Moreover, Section 5 of the Fourteenth Amendment gives the Congress the power to enforce that Article of Amendment by appropriate legislation. Disfranchisement of military personnel by the Texas Constitution continued until 1954, and there was at least one other State which disfranchised members of the regular military establishments for a long

period of time.[2] Yet in all those years there was never an act of Congress outlawing the disfranchisement, and so far as we have been able to find there was never a court decision declaring it to be invalid.

The failure of the Congress which readmitted Texas to insist upon deletion of the provision in Article III, Section 1 which disfranchised soldiers, seamen and marines can only be taken as a construction by the Congress that this provision did not offend the Fourteenth Amendment. It is a settled rule that the contemporaneous and practical construction of constitutional provisions by the legislative branch, in the enactment of laws, has great weight and gives rise to a strong presumption that the construction rightly interprets the meaning of the provisions. *Williams v. United States,* 289 U.S. 553, 573 (1933); *Ex parte Quirin,* 317 U. S. 1, 41 (1942).

We have, then, a contemporaneous construction by the Congress of the United States, the body entrusted with power to enforce the mandates of the Fourteenth Amendment, that the former provision of the Texas Constitution completely disfranchising persons in military service did not violate that Amendment. If the Amendment does not proscribe their complete disfranchisement, then clearly the present restriction does not offend its terms.

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[2]Until amended in 1920, Article VII, Section 3 of the Nebraska Constitution of 1875 (now Art. VI, Sec. 3) read: "Every elector in the military or naval service of the United States or of this state, and not in the regular army, may exercise the right of suffrage at such place and under such regulations as may be provided by law." This provision was taken as not permitting anyone in the "permanent military establishment, which is maintained both in peace and war" to vote in Nebraska. *State v. Moorhead,* 102 Neb. 76, 167 N.W. 70 (1918); 29 C.J.S., Elections, § 16, p. 37.

This contemporaneous construction necessarily must have rested either on the ground that the Equal Protection Clause did not apply to suffrage, or on the ground that the disfranchisement was not an unreasonable discrimination. On either ground, the judgment of the lower court should be affirmed.

In *Reynolds v. Sims, supra,* the Court dismissed argument in favor of the validity of state legislative apportionment schemes based on the ground that Congress had approved similar schemes in admitting states to the Union, by saying that "Congress presumably does not assume, in admitting States into the Union, to pass on all constitutional questions relating to the character of state governmental organization." 12 L.Ed.2d at 539. But we have positive proof that Congress *was* passing on the constitutionality of the franchise provisions in the Texas Constitution, because the Act of Congress readmitting Texas expressly exacted as a condition for readmission that "the Constitution of Texas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote, who are entitled to vote by the constitution herein recognized," except as punishment for crimes, etc. How could there be clearer evidence that Congress had assumed to pass on the franchise provisions of the Texas Constitution in the light of the Fourteenth Amendment and had concluded that they did not offend its terms? The Court's observations on congressional scrutiny of apportionment provisions are not applicable to the present case.

In *Mabry v. Davis,* 232 F.Supp. 930, 938 (W.D. Tex. 1964), which is now in process of being appealed to this Court, the District Court's answer to this argu-

ment was the statement in *Reynolds* that "Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights." But this answer overlooks the point of Respondent's argument, which goes to the *construction and scope of the Equal Protection Clause*. In *Reynolds*, the Court was not addressing its comments to the effect of a *contemporaneous* construction. We say that this contemporaneous construction by the Congress shows that the Equal Protection Clause, when adopted, was either intended not to apply to state franchise provisions or, if applying, was intended not to invalidate a provision such as we have in this case; that this intent fixed the scope of the Equal Protection Clause; and that its scope remains today the same as it was when adopted.

III. Validity of the Restriction on Place of Voting, as Tested by the Equal Protection Clause

A. *Introduction; statement of general rule.*

If the Equal Protection Clause applies to "voting rights,"[3] the validity of state action with respect thereto is to be tested by the same standard as in other matters.

The power of each state to determine who shall constitute its electorate, subject only to specific restrictions

[3]Although the phrase "voting rights" is sometimes used in this brief, it should be borne in mind that voting is a *privilege* and not a *right*. Moreover, it is not a privilege springing from citizenship of the United States, but from the laws of each individual state. It has been so declared both by this Court and by the Texas courts. *Minor v. Happersett*, 21 Wall. (88 U.S.) 162 (1875); *Pope v. Williams*, 193 U.S. 621 (1904); *Solon v. State*, 54 Tex. Crim. 261, 114 S.W. 349 (1908); *Savage v. Umphries*, 118 S.W. 893 (Tex. Civ. App. 1909); *Koy v. Schneider*, 110 Tex. 369, 221 S.W. 880 (1920).

in the United States Constitution, has been confirmed by this Court many times. It was stated in *Pope v. Williams*, 193 U.S. 621 (1904), and in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959). It was reiterated most recently in *Gray v. Sanders*, 372 U.S. 368 (1963).

Pope v. Williams involved the validity of a state law which required that a person coming into the state with the intention of residing there must have registered his name with the clerk of the circuit court of the proper county, thereby to indicate his intent to become a citizen and resident of the state, at least a year before he would be eligible to register as a voter. In upholding the validity of the statute, the Court said (193 U.S. at 632):

> "The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor v. Happersett*, 21 Wall. 162, 22 L.ed. 627. It may not be refused on account of race, color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution. The state might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in *Minor v. Happersett*, 21 Wall. 162, 22 L.ed. 627, such persons were allowed to vote in several of the states upon having declared their intentions to become citizens of the United States. Some states permit women to vote;

other refuse them that privilege. *A state, so far as the Federal Constitution is concerned, might provide by its own constitution and laws that none but native-born citizens should be permitted to vote,* as the Federal Constitution does not confer the right of suffrage upon any one, and the conditions under which that right is to be exercised are matters for the states alone to prescribe, subject to the conditions of the Federal Constitution, already stated; * * * ." (Emphasis supplied.)

In *Lassiter,* which upheld the power of a state to impose a uniform literacy requirement upon its voters, the Court said (360 U.S. at 50, 51):

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, Pope v. Williams, 193 U.S. 621, 633, 24 S.Ct. 573, 576, 48 L.Ed. 817; Mason v. State of Missouri, 179 U.S. 328, 335, 21 S.Ct. 125, 128, 45 L.Ed. 214, absent of course the discrimination which the Constitution condemns.
>
> "* * *
>
> "We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record (Davis v. Beason, 133 U.S. 333, 345-347, 10 S.Ct. 299, 301-302, 33 L.Ed. 637) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. * * *".

In *Gray v. Sanders,* 372 U.S. at 379, the Court said:

"States can within limits specify the qualifications of voters in both state and federal elections; the Constitution indeed makes voters' qualifications rest on state law even in federal elections. Art. I, § 2. As we held in Lassiter v. Northampton County Election Board, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed. 2d 1072, a State may if it chooses require voters to pass literacy tests, provided of course that literacy is not used as a cloak to discriminate against one class or group. But we need not determine all the limitations that are placed on this power of a State to determine the qualifications of voters, for appellee is a qualified voter."

If the Equal Protection Clause of the Fourteenth Amendment sets limits within which the state must act in specifying qualifications of voters, what are those limits? The rule for testing validity of state action under the Equal Protection Clause is summed up in the following quotation from *McGowan v. State of Maryland,* 366 U.S. 420, 425 (1960):

"* * * Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The question, then, is whether the classification is reasonable: do persons in military service constitute a

class which may properly be treated differently from other persons? In testing its reasonableness, the classification should not be viewed from the standpoint of what the Court, exercising an independent judgment, would have considered reasonable, but should be upheld "if any state of facts can reasonably be conceived to sustain it."

Military status has served as a basis for classification in many types of legislation. We have, for example, the Soldiers' and Sailors' Civil Relief Act. We have military personnel subjected to the jurisdiction of military courts, not only for infringements of regulations which go to the performance of their military duties but also for crimes that have nothing to do with those duties. We had an example of classification of military as opposed to civilian in a provision of the Texas Constitution back during World War II and continuing up until 1954, which waived payment of the poll tax as a condition for voting by members of the armed forces. Many states make special provisions for servicemen in registering to vote. In former days, it was not uncommon for state laws to limit absentee voting to persons in military service, and this is still the situation in a few states. These absentee voting laws have been sustained against claims of invalidity as class legislation, and so far as we have found no court has ever held such a law to be invalid on this ground. See Notes, 14 A.L.R. 1256, 1265, 132 A.L.R. 374, 375.

We mention these examples by way of pointing out that classification of the military on the one hand and the civilian on the other is nothing new in the law. Many of the laws making special provisions for servicemen are favorable to them, but the Equal Protection

Clause is a two-way street, prohibiting invidious discrimination both in favor of and against individuals or classes of individuals. The justification for the classification in each instance is that there are inherent characteristics of military service which distinguish the soldier[4] from the civilian. We turn our attention now to a consideration of the characteristics which make the classification a reasonable one for regulation of place of voting.

B. *Purpose and reasonableness of the restriction on place of voting.*

The Supreme Court of Texas interpreted the purpose of the restriction in the Texas law which limits place of voting to persons in military service as being "to prevent a concentration of military voting strength in areas where military bases are located." (R. 22.) That interpretation is binding on the federal courts, irrespective of the nature of the evidence upon which the state court based its finding. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 99 (1952). We might add, however, that the state court had before it ample evidence for this finding, in the form of declarations by the sponsor of the amendment in the Texas Legislature and other documentary evidence showing that the Legislature intended this to be the purpose when it proposed the amendment and that the people so understood its purpose when they adopted it. This evidence was presented without objection from Petitioner in the brief filed by Respondent in the court below.

A concentration of military voting strength in a

[4]In this brief the word "soldier" is used as a generic term embracing members of all branches of military service.

community poses two possibilities which the State of Texas deems to be inimical to the public welfare. The first is that control of community affairs will be dominated by the military, which could come about by pressure or persuasion of military commanders or by the cohesion which exists among the members of a military organization. The second possibility is that the balance of power in community affairs will rest with a group whose members are, in the final analysis, only temporary residents of the place where they are stationed and who might lack a proper understanding and concern for the best interests of the community.

The desire to avert the first possibility is but a manifestation of a deep-rooted fear of military domination which has permeated our state and national governments throughout the history of this nation. As a result of this fear, the constitutions of 49 states contain provisions declaring the principle of subordination of military authority to civil authority.[5] In an address delivered in 1962, which is published in 37 New York University Law Review 181, Chief Justice Warren observed, at pp. 183 and 185:

> "It is significant that in our own hemisphere only our neighbor, Canada, and we ourselves have avoided rule by the military throughout our national existence. This is not merely happenstance. A tradition has been bred into us that the perpetuation of free government depends upon the continued supremacy of the civilian representatives of the people. * * *

[5]See *Index Digest of State Constitutions* (2nd ed. 1959), p. 697, published by Legislative Drafting Research Fund of Columbia University. The provision in the Texas Constitution, Art. I, Sec. 24, reads: "The military shall at all times be subordinate to the civil authority."

"Civil supremacy has consistently been the goal of our government from colonial days to these. As late as 1947, when the Department of Defense was established, Congress specifically provided for a civilian chief officer. And when President Truman asked the Congress for an amendment to make an exception for a soldier and statesman as great as the late George C. Marshall, serious debate followed before the Act was modified to enable him to become Secretary of Defense, and then only by a small majority of the total membership of the House and less than half of the Senate. Those who opposed the amendment often expressed their high regard for General Marshall, but made known their fears concerning any deviation, even though temporary, from our traditional subordination of military to civil power.

"The history of our country does not indicate that there has ever been a widespread desire to change the relationship between the civil government and the military; and it can be fairly said that, with minor exceptions, military men throughout our history have not only recognized and accepted this relationship in the spirit of the Constitution, but that they have also cheerfully cooperated in preserving it.

"Thus it is plain that the axiom of subordination of the military to the civil is not an anachronism. Rather, it is so deeply rooted in our national existence that it must be regarded as an essential constituent of the fabric of our political life."

This first type of situation which the restriction is designed to avert is less likely to occur than the second, but it is by no means so remote that it should be written off as failing to provide a reasonable basis for the state's action. In fact, the present amendment has evolved from a threat to civil authority in the early

history of Texas. Its background is related in the following quotation from "History of Texas Election Laws," by Abner V. McCall, Dean of the School of Law, Baylor University, 9 Vernon's Annotated Texas Statutes, p. XVII, published in 1952:

> "The Second Congress [of the Republic of Texas] in 1837 enacted the first election law * * *.
>
> "This first act contained a novel section providing 'that regular enlisted soldiers and volunteers for during the war, shall not be eligible to vote for civil officers.' This provision was no doubt inspired by the mutinous conduct of the nonresident volunteers who had been recruited in the United States after the Battle of San Jacinto. They had defied the provisional government and on one occasion in July, 1836, had sent an officer to arrest President David G. Burnett and his cabinet to bring them to trial before the army. They had continued their rebellious conduct after Sam Houston became the first president under the Constitution of 1836. It was not until May, 1837, that Houston was able to dissolve the army and eliminate this threat to civil authority. This provision disfranchising soldiers in the regular army was placed in the 1845 Constitution of the State of Texas and has remained in each succeeding constitution. It was modified in 1932 to exempt the National Guard and reserve and retired officers and men."

The 1932 amendment was replaced in 1954 by the present provision (R. 21).

Burned as a child, Texas has continued to be wary of the fire—more so than the majority of her sister states. The law in other states is discussed at a subsequent point in this brief, but let us say here that the fact that some states have not taken steps to counter-

act a threatened danger does not make unreasonable the laws of other states that have dealt with it. Nor is it necessary to the validity of this purpose that the state show a likelihood of occurrence at every election, or once in ten years, or in twenty or fifty years—if likely to occur at all, the occurrence is so grave that the state may protect itself against the possibility.

Two hypothetical examples will serve to illustrate that this threat of military domination is not just an illusion. Instances have been known where a feud has developed between the local police on the one hand and the commander of a military base and his men on the other hand. Suppose an election for city officers is coming up, and the commander sees a good chance to have the chief of police ousted by changing control of the city council. It would not be difficult for the commander to find ways to persuade or induce the voting members of his command to cooperate—in fact, in these circumstances they would probably be only too happy to do so, in view of the loyalty to his commanding officer and to his military organization which is instilled into every soldier.

Another example leads into the realm of ideologies, and here again history gives us occurrences which show that this is not a farfetched possibility. Suppose a military commander having strong views about America and its institutions, how the nation should be preserved and how its future should be guided, objects to what some of the teachers are teaching in the local school system and decides to attempt to influence a school trustee election for the purpose of changing what is going on in the schools. It would be naive to think that a strong-willed, determined commander

could not exert his influence in various ways, both open and subtle. And what would that be but subjection of civil authority to military authority, where the military authority was able to control the votes which would determine the outcome of the election and would thereby dictate the policy of the community?

In *Mabry v. Davis, supra,* 232 F.Supp. at 937, the Court has noted that federal law prohibits an officer from attempting to influence a person's vote. But does this law protect against the indirect influence which may be exerted in numerous ways? Furthermore, regardless of the officer's accountability for his acts under federal law, a completed election would not be reversible because of his culpable behavior.

The second type of hazard does not involve concerted action of the military as a group, but does arise from a characteristic of military service—that persons in service constitute a mobile population, usually remaining in the same place not longer than two, three, or four years and always subject to being ordered to some other place.

Petitioner avers an intent to make El Paso his permanent home, but such an intent is not required in order for a person to establish legal residence. The essentials for acquiring domicile are stated in *Ellis v. Southeast Construction Co.,* 260 F.2d 280, 281 (8 Cir. 1958) as follows:

> "Generally speaking, in order '[to] acquire a domicil of choice, the law requires the physical presence of a person at the place of the domicil claimed, coupled with the intention of making it his present home. When these two facts concur, the change in domicil is instantaneous. *Intention*

to live permanently at the claimed domicil is not required. If a person capable of making his choice honestly regards a place as his present home, the motive prompting him is immaterial. Restatement of Conflict of Laws, §§ 15, 22.' Spurgeon v. Mission State Bank, 8 Cir., 151 F.2d 702, 705-706, certiorari denied 327 U.S. 782, 66 S.Ct. 682, 90 L.Ed. 1009." (Emphasis supplied.)

Thus, all that a soldier must be able to show in order to establish residence at his present "permanent station"* is that he does not intend to go back to the place last claimed as his home and that he intends to remain at his present station until ordered elsewhere. Every person assigned to a permanent station is a potential resident of the community where he is stationed. The burden is on Petitioner to show that the percentage of military personnel who do claim residence at the place where they are stationed is so slight as to create no hazard in voting.

The soldier who is in service only for the purpose of fulfilling compulsory military duty is not likely to establish residence where he is stationed, but the bulk of military personnel consists of persons voluntarily in service for a longer duration. As in the case of Petitioner, after several years away from their original home they may no longer care to return. They have no permanent home; home to them is where they are living. And that is the place which they very likely would list as their residence.

The practice of claiming residence at whatever place

*In the District Court opinion in *Ellis*, 158 F. Supp. 798, 800, "permanent station" was explained to mean a station to which one's family may be brought at government expense and where he may reasonably expect to remain for a material period of time.

the soldier is stationed, without his possessing an intent to make it his permanent home, is illustrated in the *Ellis* case. The plaintiff, a resident of Arkansas at the time he entered service in 1939, had been in service for nearly 19 years and intended to retire upon completion of 20 years. He was then stationed at Barksdale Field, Shreveport, Louisiana, and was claiming domicile there, testifying in support of his claim that he intended to make it his permanent home and to continue to live there after retirement. As to claimed residence during the previous 18 years, it is stated in the opinion (260 F.2d at 282):

> "* * * Plaintiff stated that the last time he declared Arkansas to be his home was when he re-enlisted in 1945. For a period of seven years immediately prior to the Korean conflict, plaintiff and his family lived at Tampa, Florida, and while stationed there he re-enlisted two times, and on each occasion declared Tampa as his home. Plaintiff was stationed at Rapid City, South Dakota, from January, 1953, to July, 1955, and at Salina, Kansas, from July, 1955, to March, 1956. Since March 28, 1956, plaintiff and his family have resided in Louisiana, * * *."

Under the rule stated by the Court (which accords with the law of residence as interpreted by the Texas courts), the plaintiff would have been a bona fide legal resident, for the time, of each of the places which he had claimed to be his residence.

The rationale for excluding military personnal from voting at the place where they are stationed, on the ground that they are a mobile population, is that because of the impermanence of their residence they may lack knowledge of and interest in the affairs and needs

of the community which a voter should have. Lack of knowledge and interest is accepted in all jurisdictions as a proper ground for withholding the voting privilege, in the requirement that the voter be a citizen and in the requirement that the citizen must have resided within the state and within the county, city, or election precinct for certain lengths of time before he is eligible to vote.[7] Until a citizen has fulfilled these requirements, he is denied the right to vote in any election, and he has also lost his right to vote at the place of his former residence. In short, he is disfranchised during this period.

The length-of-residence requirement is justified on the ground that it "affords some surety that the voter has in fact become a member of the community and that, as such, he has a common interest in all matters pertaining to its government and is therefore more likely to exercise his right intelligently." *Wright v. Blue Mountain Hospital District,* 214 Or. 141, 328 P.2d 314, 318 (1958). Every state excludes a person from voting unless he is domiciled in the state, regardless of how long he has been an actual "temporary" resident. Although the law permits a soldier to claim legal residence at the place where he is stationed, he can never really be anything but a temporary actual resident throughout his military career, because he is always subject to transfer. The same rationale which supplies the reasonableness of the exclusion in the case

[7]Twelve states require a state residence of six months, 36 states require a residence of one year, and two require a residence of two years. *The Book of the State, 1964-1965,* p. 24, published by The Council of State Governments. Within the last few years, 15 states have enacted laws which reduce or eliminate the length-of-residence requirement for voting in presidential elections.

of general residence requirements support the reasonableness of the present exclusion.

Residence requirements and the present restriction are both applications of the general principle stated in the following quotation from *Savage v. Umphries,* 118 S.W. 893, 899 (Tex.Civ.App. 1909):

> "Who shall exercise suffrage is a fundamental question, which the body politic must decide upon a just view of the true relation between the power of the suffragans and the rights of the whole people. Hence the exercise of the elective franchise is not a natural or God-given right, but is, as the word 'franchise' implies, a right conferred by the state or body politic. In other words, as is said by an eminent authority on constitutional law, the questions whether one is fitted by intelligence to perform the function of an elector, or has such interests is the matters controlled through his suffrage as to check the misuse of power which self-interest prompts, *or has such community of interest in the laws which are to govern the community, which should fit him for the discharge of the duties of a suffragan,* must be determined by the body politic. 'If he lacks intelligence, it is the greatest absurdity to give him the suffrage, and the greatest wrong to the community. *If he lacks community of interest in the laws which are to govern the community, it is not only a serious danger, but a false principle, to give it to him, for thus you give power to the hand which is alien to the rights of others which it controls.*' Tucker on the Constitution, 89." (Emphasis supplied.)

The temporary nature of the soldier's residence at his duty station was the ground on which the majority of the Supreme Court of Texas found a reasonable basis for excluding him from the privilege of voting at that place. The Court said (R. 22):

"Persons in military service are subject at all times to reassignment, and hence to a change in their actual residence. They are residents in a particular place for a particular period of time under compulsion of military orders; they do not elect to be where they are. Their reasons for being where they are, and their interest in the political life of where they are, cannot be the same as the permanent residents. This is not to say that military personnel are any less citizens; it is to say that military personnel in the nature of their sojourn at a particular place are not, and cannot be, a part of the local community in the same sense as its permanent residents. Denying to such personnel the right of suffrage in the place where they may be stationed—while in no sense denying the exercise of such right in their place of original residence—is not unreasonable and the classification established is nondiscriminatory. The voting restrictions operate alike upon all members of the class."

We will give two examples to illustrate the public policy back of this motivating reason for the restriction. In Texas, whether intoxicating liquors may be sold in a given area is determined by "local option" elections held in individual counties, cities, or justice precincts upon petition of voters residing in the affected territory.[8] Within the State of Texas there are large military bases located in traditionally "dry" areas. Some of the communities in which the personnel from these bases live are small-town or semi-rural. Suppose an election was called on the question of legalizing the sale of liquor. If servicemen were allowed to vote, it is not unreasonable to assume that their vote might determine the outcome of the election. We would

[8]Vernon's Texas Penal Code, Art. 666-32. Each county is divided into not less than four nor more than eight justice precincts. Tex. Const. Art. V, Sec. 18.

predict that if a public opinion poll were taken, it would show a general feeling in these communities that the likelihood of carrying the proposition would be greatly enhanced by permitting servicemen to vote.* As applied to elections of this nature, the restriction evidences a public policy to leave the determination of questions affecting the habits, mores, and traditions of the community to the permanent civilian population, rather than to allow it to be determined by a group of persons who have been brought up under differing sets of mores and who are here today but likely to be gone within a short space of time. Can it be said that this is an arbitrary policy, unrelated to a proper object of public welfare or interest?

Let us digress to answer Petitioner's assertion, on page 9 of his brief, that there is "no proof that there is any such area where the military voting strength would control the local politics." First, whether such an area does exist at this moment is unimportant, if it is possible for such an area to exist. There do exist in the State of Texas a number of areas wherein the number of military voters might reasonably be expected to outnumber civilian voters if the present deterrent to establishment of legal residence were removed. There was no opportunity for introduction of evidence of

*In September, 1964, following the decision in *Mabry v. Davis, supra,* holding this restriction on voting to be in violation of the Equal Protection Clause, the writer of this brief received a call from a resident of the justice precinct in which Bergstrom Air Force Base is located in Travis County, near Austin, wanting to know if servicemen could now vote in Texas. He explained that if the servicemen could vote, he and others were interested in petitioning for an election to legalize the sale of liquor in that precinct. Bergstrom is under the Strategic Air Command, which has a three-year rotation policy.

this nature in the lower court, but it can be found in census reports and other official records of which this Court can take judicial notice. Secondly, the validity of the purpose does not demand the possibility of a greater number of military voters than civilian voters, but requires merely the possibility that the balance of power would rest with the military voters.

A second example where the impermanence of residence might well prevent the serviceman from having the "community of interest" that voters should possess is in bond elections for local improvements. It is not uncommon for married soldiers to buy a dwelling house at the places where they are stationed and to sell when they are transferred.[10] Suppose there is an election to authorize issuance of bonds for long-range improvements. Authorization of the bonds will mean an immediate raise in property taxes. The serviceman who expects to remain in the community for no longer than two, three, or four years may not care what the community is like five or ten years from then. Can it be said that there is no reasonable basis for seeking to prevent the hamstringing of community progress by persons in that status?

There are in Texas several large military bases with normal strength of 10,000 to 40,000 men, and there is a strong likelihood that the outcome of many elections would turn on the military vote. Here again, the fact that most of the other states have not taken steps to

[10] In *Ellis v. Southeast Construction Co.*, 158 F. Supp. 798, 804 (W.D. Ark. 1958; reversed 260 F. 2d 280), the Court noted the plaintiff's testimony in that case that an estimated ten to fifteen percent of married noncommissioned officers of his own rank (technical sergeant) were accustomed to buying instead of renting.

prevent this occurrence, or that they are willing to tolerate it, does not render the Texas law invalid. States frequently have different concepts of what is best for the public welfare. Some states allow gambling, others do not; some allow branch banking, others do not; some require plumbers to be licensed, others do not—and so on. The Texas law cannot be held invalid unless there is no conceivable justification for the public policy which this restriction expresses.

In *Mabry v. Davis,* 232 F.Supp. at 936, the District Court expressed the belief that present election laws of Texas "provide sufficient safeguards to make it highly unlikely that the balance of voting power between the military and civilian in this state will be substantially altered by a removal of the ban against those who enter military service from another state."[11] The Court mentioned in particular the statutes which permit challenge of a voter's qualifications when he registers and when he offers to vote. We do not see this as a protection against either of the hazards we have discussed. As to all those voters who in good faith stated an intent not to return to the place formerly called home, the challenge could not be sustained. For those who were not entitled to claim a new residence because they still had ties with some other place which bound them to it as residents of that place, it is not likely that a tax collector or an election judge would have these facts within his knowledge and hence would have no ground for making or sustaining the challenge.

[11]In *Mabry,* as in the case now before this Court, the suit was brought by persons who entered service as residents of another state. It should be kept in mind that the provision operates alike upon persons who entered as residents of Texas and those who entered as residents of other states. (R. 23.)

As already pointed out, the burden is on Petitioner to prove the unreasonableness of the classification. This action was brought as an original mandamus proceeding in the Supreme Court of Texas. That Court does not hear evidence, and jurisdiction in original proceedings is entertained only when there are no disputed fact issues involved in the case. In these circumstances, Petitioner did not have the opportunity to adduce evidence that he would have had if the suit had been filed in a trial court, but his choice of forum does not relieve him of the burden of proving absence of any factual basis to justify the classification.

Petitioner has offered no evidence to refute the reasonableness of the classification, and he has offered no decision of this Court which supports his claim of invalidity.

Petitioner relies on statements made in recent apportionment cases decided by this Court. (Petitioner's Brief, pp. 12-13.) We preface our reply to this portion of the brief with a quotation from Mr. Justice Stewart's dissenting opinion in *Lucas v. The Forty-Fourth General Assembly of the State of Colorado,* 12 L.Ed.2d 581 (1964):

> "It is important to make clear at the outset what these cases are not about. They have nothing to do with the denial or impairment of any person's right to vote. Nobody's right to vote has been denied. Nobody's right to vote has been restricted. Nobody has been deprived of the right to have his vote counted. The voting right cases which the Court cites are, therefore, completely wide of the mark. Secondly, these cases have noting to do with the 'weighting' or 'diluting' of votes cast within an electoral unit. The rule of *Gray v. Sanders,* 372

U.S. 368, is, therefore, completely without relevance here. * * *"

Conversely, the apportionment cases are not apposite to this case. The statements relied on by Petitioner were made in a context involving an entirely different question from the one here involved, and they cannot be transferred to a new context without proper consideration of the changed legal questions.

Petitioner quotes the statement by Chief Justice Warren in *Davis v. Mann* that "discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible." The key phrase there is "without more being shown." In the present case, we submit that a reasonable and valid basis for the discrimination has been shown.

The key word in the quotation from Mr. Justice Black's opinion in *Wesberry v. Sanders* is an *unnecessary* abridgment of the right to vote. The key phrases in the quotations from Mr. Justice Clark's opinion in *Wesberry* and Chief Justice Warren's opinion in *Reynolds* are *"qualified* citizens" and *"qualified* voters." If there is a reasonable basis for restricting the right in the interest of the public welfare, the suffrage has not been abridged unnecessarily and persons coming within the restriction cannot be called "qualified voters."

Petitioner relies on *Gray v. Sanders* as supporting his contention. That case dealt solely with the weight to be given to the vote of a qualified elector, and the power of the state to give the vote of some of its electors greater effect than that of others. It had nothing to do

with the state's power to determine who are its qualified electors. The Court made this clear by pointing out that it did not need to determine in that case the limits of the state's power to specify the qualification of voters, because plaintiff was a qualified voter, and then by stating the rule of the case:

> "* * * But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded." 372 U.S. at 381.

C. *The restriction on place of voting is not a denial of voting rights.*

Every state and territory of the United States permits its residents to maintain residence during absence in military service, and if a resident is a qualified elector under the laws of the state, he may vote in its elections. And the privilege of voting in the state of residence at the time of entering service may be effectively carried out, because every state and territory except Puerto Rico has laws providing for absentee voting by persons absent in military service. See *Voting Information 1964,* Pamphlet DoD Gen-6, published by Armed Forces Information and Education, U. S. Department of Defense.

Thus, it is seen that any serviceman who is left without a place to vote finds himself in that condition by his own volition in choosing to change his place of legal residence. We submit that a serviceman does not suffer any substantial injury by being required to maintain his legal residence at the place where he entered service in order to preserve voting privileges. We submit, further, that a state may deny to persons in military serv-

ice the power to acquire a domicile while serving under orders which make them subject to transfer at any time. But Texas does not go that far. She permits the person in military service to become a legal resident for all purposes except voting, thereby being able to escape the burdens which might have been imposed on him by the state of his former residence (e.g., state income tax)[12] and to acquire privileges for himself or members of his family which the State of Texas accords to its residents. The fact that Texas allows a person, present within the state under circumstances which ordinarily would not vest him with the status of a resident, to acquire that status by the exercise of his free choice, should not prevent the state from restricting and regulating the privileges accompanying a residence so acquired.

On page 8 of his brief, Petitioner makes the following statement:

> "* * * [U]nder the facts of this case, since the Petitioner was only 18 years of age when he originally entered the service, in all probability he never had an opportunity to establish a voting residence prior to entering the service. If all states had the same constitutional provision as Texas, Petitioner most certainly could not have acquired a voting residence in any state since entering the service in 1946."

In this argument, Petitioner makes the false assumption that a person must have been of voting age, and actually a voter, at the time he entered service in order to vote in the state of which he was a resident at the time he entered service.

[12]Thirty-five states and the District of Columbia levy a personal income tax. Texas does not have a state income tax. Commerce Clearing House, *State Tax Guide*, p. 1501.

Petitioner entered service as a resident of Alabama. As in every other state of the United States, the law of Alabama permits a person in military service to retain his residence in that state during the period of his service, regardless of his absence. The pertinent provisions of the Alabama law are set out on the next page of this brief. If Petitioner had chosen to retain his residence in Alabama, that state would have recognized him as a resident although he was absent in military service, and after he became 21 years old he could have voted there.

Petitioner further states, on page 8 of his brief, that so far as he can ascertain, Texas is the only state in the United States which denies voting privileges to a legal resident of the state solely for the reason that he is in the military service." We do not dispute that a majority of the states permit military personnel to acquire a voting residence under certain circumstances. But Texas is not alone in denying the privilege. Although we consider it unessential to the validity of the Texas law, we call the Court's attention to the laws of a number of states which apparently do have the same effect.

Alabama Code, 1940 (Recompiled 1958), Tit. 17,

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[11]In *Mabry v. Davis*, 323 F.Supp. at 937, footnote 15, the District Court referred to a stipulation in that case that if called as a witness the Voting Officer of the Department of the Air Force would testify: "The State of Texas is the only state in the union which will not permit an otherwise eligible member of the Armed Forces of the United States to acquire legal domicile, for the purpose of voting, upon demonstration of intent to do so, and upon fulfillment of state requirements of residence * * *." Defendants in that case agreed to the stipulation in order to eliminate the necessity of calling witnesses at the hearing, but they disputed the accuracy of the statement and put into evidence the laws of the various states to refute it.

Sec. 17." "No person shall lose or acquire a residence either by temporary absence from his or her place of residence without the intention of remaining, or by being a student of an institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence, or by being absent from his or her place of residence in the civil or military service of the state, or the United States; *neither shall any soldier, sailor or marine, in the military or naval service of the United States, acquire a residence by being stationed in the state.*" (Emphasis supplied throughout these quotations.)

Georgia Constitution, Sec. 2-702. "Paragraph II. Who shall be an elector entitled to register and vote.—Every citizen of this State who is a citizen of the United States, eighteen years old or upwards, not laboring under any of the disabilities named in this Article, and possessing the qualifications provided by it, shall be an elector and entitled to register and vote at any election by the people: *Provided, that no soldier, sailor or marine in the military or naval services of the United States shall acquire the rights of an elector by reason of being stationed on duty in this State.*"

Indiana Constitution, Art. 2, Sec. 3. "No soldier, seaman or marine, in the army or navy of the United States, or of their allies, shall be deemed to have acquired a residence in the State, in consequence of having been stationed within the same; *nor shall any such soldier, seaman, or marine have the right to vote.*"

Kansas Constitution, Art. V, Sec. 3. "For the

[14]A footnote to this section in the edition published by The Michie Company states that this section is superseded as to Jefferson County, citing § 330 (249h) of Title 62. The Attorney General of Alabama has informed us that this is a printer's error and there is no such section.

purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas, nor while a student of any seminary of learning, nor while kept at any almshouse or other asylum at public expense, nor while confined in any public prison; and the legislature may make provision for taking the votes of electors who may be absent from their townships or wards, in the volunteer military service of the United States, or the militia service of this state; *but nothing herein contained shall be deemed to allow any soldier, seaman or marine in the regular army or navy of the United States the right to vote.*"

Nevada Constitution, Art. 2, Sec. 3. "The right of suffrage shall be enjoyed by all persons otherwise entitled to the same who may be in the Military or Naval service of the United States; *provided, the votes so cast shall be made to apply to the County and Township of which said voters were bona-fide residents at the time of their enlistment,* * * *.*"

Oregon Constitution, Art. II, Sec. 5. "No soldier, seaman, or marine in the Army, or Navy of the United States, or of their allies, shall be deemed to have acquired a residence in the state, in consequence of having been stationed within the same; *nor shall any such soldier, seaman, or marine have the right to vote.*"

Although permitting military personnel to acquire legal residence while living off the post, many states prevent a person in military service from acquiring legal residence while he is living on a military post. See Note, 21 A.L.R.2d p. 1173. This rule is stated as

follows in Restatement, Conflict of Laws, § 21, Comment (c):

> "A soldier or sailor, if he is ordered to a station to which he must go and live in quarters assigned to him, cannot acquire a domicil there though he lives in the assigned quarters with his family; for he must obey orders and cannot choose to go elsewhere. If, however, he is allowed to live with his family where he pleases provided it is near enough to his post to enable him to perform his duty, he can acquire a domicil where he lives."

This seems to be making a distinction without a valid substantive difference. In both cases, the soldier's presence in the community is by virtue of his having been ordered to duty in that locality. Of what significance is it that he is required in one case to live within the confines of a certain area? It is submitted that all of these laws denying a right to acquire legal residence are also within the ambit of Petitioner's attack on the Texas law.

D. *The classification is not invalid because it fails to cover other areas of possible evil.*

The dissenting opinion in the Court below contains this language (R. 30):

> "With present day mobility and industrialization, large groups, *other than servicemen,* move into the various communities of this state for limited stays, and establish voting residence. One need only look to the large shifts of civilian population to major construction areas as an illustration of this fact.
>
> "Wherein lies the reasonable basis for distinguishing between these groups?"

The answer to this query is two-fold: (1) There are substantial distinguishing characteristics, and (2) failure to cover every individual or group of individuals who might pose a similar threat to the public welfare does not invalidate the classification.

The reference obviously is to persons who go to major construction areas for the purpose of taking part in the construction rather than those who go there to utilize the facilities which have been constructed. As to the latter, their intention is to become permanent residents. Nor is the proposed analogy appropriate to persons in construction trades who are drawn to a growing community because work prospects are good. The growth is likely to continue over a long period of time, perhaps indefinitely, and these persons ordinarily would intend to remain there permanently. The fact that an unanticipated change in economic conditions might impel them to change residence at some unpredictable future time would make them no less permanent residents so far as their attitudes and interests in the community were concerned. The reference apparently is to workers on major construction projects.

As to persons who enter a community to engage in major construction projects and who intend to remain only until the project is completed, the following factors distinguish them from the military:

(a) Very few construction projects are of such duration that it would induce the workers to claim residence at that place or would require them to remain there for any substantial period beyond that required to become qualified voters at that place. In other words, the likelihood of claimed residence and voting is smaller. The soldier's sojourn is temporary, too (which, as

noted, is one ground for withholding voting privileges at that place), but ordinarily he would remain from two to four years at each permanent station. Furthermore, construction companies have fixed permanent locations to which their employees feel attached, whereas ordinarily a military unit has no permanent "home base." This difference also reduces the likelihood of claimed residence at the work site.

(b) Very few construction projects are of such magnitude as to require so many workers that the ratio of "temporary" residents to permanent residents would be substantial. On the other hand, large military bases are frequently located in the neighborhood of small towns and in relatively sparse population areas.

(c) Construction projects are one-shot propositions, whereas military bases have some degree of permanence. Although the personnel at a base is in a continual state of change, the base itself remains, and the community would be subject to a continual threat from the military vote.

(d) There is not the same degree of cohesion among members of a construction crew as exists among military groups, and they are not subject to the same degree of coercion or control by superiors. Consequently, they are less likely to act as a group.

(e) A construction worker is free to sever his employment with the construction company and remain in the community if he desires to do so, whereas a soldier does not have that privilege.

Other differences could also be mentioned, but these suffice to demonstrate the dissimilarity of the two groups.

But even if the analogy held, the provision should not be struck down because of failure to place a similar restriction on the other group. A classification is not rendered invalid by failure to cover "the whole field of possible abuses" and will not be overturned because it does not extend to all subjects which legitimately might be included. *Carroll v. Greenwich Insurance Co.*, 199 U.S. 401, 411 (1905); *Central Lumber Co. v. South Dakota*, 226 U.S. 157, 160 (1912); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1936). Numerous other cases are cited in 12 Am. Jur., Constitutional Law, § 484, pp. 160-163, and 16A C.J.S., Constitutional Law, § 499, pp. 250-251.

Mabry mentions that the wives of servicemen are not precluded from voting at the place where their husbands are stationed. 232 F.Supp. at 938. If this comment is by way of suggesting that the restriction on servicemen is invalidated by failure to include the wives; the rule just cited also answers that criticism.

E. *The classification is not invalid because it results in some inequities.*

Thus far our discussion has been directed to the restriction as applied to the whole class of military personnel. Petitioner makes a plea of inequity as applied to him individually, by cataloging facts in his case which set him apart from the general class of servicemen who might claim a voting residence at their duty station if the restriction were removed. He has been in service for almost 20 years and is already looking to the time when he will retire. He and his family have chosen El Paso as the place where they want to "settle down," and they are already putting down roots to

become permanently a part of the community where they now live. Petitioner has bought a home and a small business, and his family would remain in El Paso if he were transferred to some other station.

Is this typical of persons in military service? What percentage of the men who are stationed at the White Sands installation where he serves have similar purpose? Is it usual among military personnel generally that most of them intend to remain permanently at the place where they are stationed, and could they do so even if they so desired? Common knowledge bears witness to the contrary. The record is silent as to where Sergeant Carrington served during the years from 1946 to 1962, or as to what place or places he claimed to be his residence during that time. But the fact that during 16 years of his career he was stationed at places where he did not intend to live permanently demonstrates that his present situation is not typical of servicemen generally.

Respondent takes the position that the restriction on place of voting is not unreasonable as applied to Petitioner individually. The first type of hazard which the restriction is designed to prevent—concerted action by a military group—is not removed by any of these special circumstances.[15]

[15]Petitioner performs his military duties at White Sands, New Mexico, but resides in El Paso. Petitioner's attorney has informed counsel for Respondent that Petitioner travels to the military base on the days that he is on duty, returning to his residence in El Paso at night. He has stated further that a considerable number of other military personnel assigned to duty at White Sands also live in El Paso. Additionally, there are several military installations located in El Paso County, in the vicinity of El Paso, and as of June 30, 1962, there were 24,732 military personnel assigned to these installations. This information was furnished by the Assistant Secretary of Defense.

As to impermanence of residence, although Petitioner might *wish* to remain in El Paso, so long as he is in military service he is subject to being sent elsewhere. Although he asserts that he "voluntarily selected Texas to be his permanent home," his presence there *at this time* is directly related to his being in military service: he is living in El Paso because his military station is near enough to permit him to do so. Although he has some leeway as to the exact locale, he is living in El Paso only because military orders have assigned him to a station in that area. He is continuingly subject to military orders which may take him hundreds of miles from El Paso, and which may keep him away from El Paso throughout the remainder of his military career. He may intend to make El Paso his permanent home after he retires from service, and as to that future time he is free to exercise his choice; but as to the present, where he lives is subject to the superior will of military authority. So long as he is in military service, it would not be unreasonable to say to him, "You cannot establish a *present* domicile in El Paso and you cannot claim any of the privileges of domicile at this time, because you are not free to choose where you live." *A fortiori,* it is not unreasonable to withhold part of the privileges of domicile until he becomes in fact a permanent resident.

But even if it should be conceded that Petitioner shows special "equities" that set him apart from the general class of military personnel, that does not render the retriction invalid as to him. The reasonableness of the classification is not to be tested by the isolated example, and the classification does not fail merely because it results in some inequity. *Lindsley v. Natural*

Carbonic Gas Company, 220 U.S. 61, 78 (1911); *Second Employers' Liability Cases*, 223 U.S. 1, 53 (1912); *Phelps v. Board of Education*, 300 U.S. 319, 324 (1937); *Spahos v. Mayor & Councilmen of Savannah Beach, Ga.*, 207 F. Supp. 688, 692 (S. D. Ga. 1962, affirmed 371 U.S. 206). A host of other authorities are collected in 12 Am. Jur., Constitutional Law, § 483, pp. 158-159, and 16A C.J.S., Constitutional Law, § 490, p. 251. The principle is well put in *Louisville & N. R. Co. v. Melton*, 218 U.S. 36, 54 (1910), wherein it was contended that a state statute modifying the doctrine of fellow servant as applied to railroad employees was invalid because it applied to all such employees. It was argued that the statute could be valid only if it were made to apply solely to employees exposed to dangers peculiarly resulting from the operation of a railroad, "thus affording ground for distinguishing them for the purpose of classification from coemployees not subject to like hazards or employees engaged in other occupations." The Court rejected this argument in the following language:

> "* * * In other words, reduced to its ultimate analysis the contention comes to this; that by the operation of the equal protection clause of the Fourteenth Amendment the States are prohibited from exerting their legitimate police powers upon grounds of the generic distinction obtaining between persons and things, however apparent such distinction may be, but, on the contrary, must legislate upon the basis of a minute consideration of the distinctions which may arise from accidental circumstances as to the persons and things coming within the general class provided for. When the proposition is thus accurately fixed, it necessarily results that in effect it denies the existence of the power to classify, and hence must rest upon the

assumption that the equal protection clause of the Fourteenth Amendment has a scope and effect upon the lawful authority of the States contrary to the doctrine maintained by this court without deviation. This follows since the necessary consequence of the argument is to virtually challenge the legislative power to classify and the numerous decisions upholding that authority. To this destructive end it is apparent the argument must come, since it assumes that however completely a classification may be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class. A brief reference to some of the cases dealing with the power of a State to classify will make the error of the contention apparent."

We submit that as to the whole class of which Petitioner is a member, the restriction on place of voting is reasonable and just, and the fact that a few inequities may result does not invalidate the classification. If Petitioner seeks to set himself apart from the class, it is incumbent upon him to prove that there is a sufficient number of others similarly situated, within the general class, as to render the classification invalid for being broader than permissible. This he has wholly failed to do.

Petitioner indirectly concedes that the restriction is reasonable as applied to persons not intending to reside permanently at the place of new residence, in the following statement on page 10 of his brief:

"* * * If the matter of concern were that persons in military service acquire a new residence by the order of their superiors and not by their own

choice, and that merely living in Texas is no proof of a desire to make it their permanent residence, then the remedy would be to prescribe what acts are necessary for military personnel to prove the requisite intent to establish permanent residence, rather than to prevent the possibility of establishing residence for voting, no matter what the quantum of proof that their intended home is their newly acquired residence. To foreclose this possibility is to arbitrarily deny military personnel stationed in Texas equal protection of the laws."

Respondent agrees with Petitioner, that if the present restriction is invalid, the state certainly should be able to impose more rigid requirements which military personnel must fulfill in order to establish a voting residence than is required of civilians, but if the present law is bad, Petitioner's suggestion itself would raise a question of denial of equal protection. Assuming that the state could prescribe acts necessary for military personnel to prove an intent to reside permanently at the place of new residence, what would those acts be? We submit that Petitioner's suggested remedy is unfeasible, and that the protection of the public welfare supersedes any inconvenience or hardship that Petitioner may incur from the restriction.

Let us consider the acts by which Petitioner has manifested an intent to make El Paso his permanent home.

Presence of his family. It is common knowledge that many married servicemen regularly take their families with them to whatever post they are assigned within this country, and even take them to foreign posts when military regulations permit. This cannot be taken as evidence of an intent to establish permanent residence.

Purchase of a dwelling place. "It is cheaper to buy than to rent" is a common slogan. Many married soldiers, having no intent to remain in the community longer than their military duties require, might still find it advantageous to buy a house for occupancy during that time and to sell it when they leave.[16]

Acquisition of a business. This is the only overt act alleged by Petitioner which might have any real value as evidencing an intent to remain permanently in El Paso. How many soldiers can put themselves into this narrow catagory? Must the state make special laws permitting soldiers to vote if they evidence an intent to become permanent residents by acquiring a business? And if this were made a *sine qua non* for voting residence; would the law be a fair one?

As a practical matter, it would be virtually impossible to mold a uniform law prescribing "acts necessary to prove the requisite intent" which would be both fair and meaningful. The situation in the final analysis reduces itself to having to accept the individual's word as to what his intent is for permanency of residence. Without impugning the integrity of the class, and making an observation which is equally applicable to all human beings, civilian and military, we submit that the state is left with small protection against the possible occurrence of the events which the law is designed to prevent if it must accept the statement of intent at face value. Declaration of intent as to what one is going to do at some remote time in the future is so subject

[16]See footnote 10, *supra*, citing *Ellis v. Southeast Construction Co.*, 158 F. Supp. 798, 804. In that case, the District Court commented on the weight which should be given to the purchase of a house as indicating a change of domicile.

to dissembling and is so open to change that it carries no guaranty.

So, if one concedes the validity of the purpose to exclude from suffrage those members of the armed forces who are only temporary residents of the community, one must also concede the validity of the exclusion of the entire class, because it becomes impracticable to separate the class. The Equal Protection Clause does not require that the state tailor its laws to prevent every case of inequity. "A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicely or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co., supra.*

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the Supreme Court of Texas should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, MARY K. WALL, one of the attorneys for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of December, 1964, I served copies of the foregoing Brief for Respondent on WAYNE WINDLE and W. C. PETICOLAS, attorneys for Petitioner, by mailing two copies to them in a duly addressed envelope, with first class air mail postage prepaid, at the address of Suite 12-E, El Paso National Bank Building, El Paso 1, Texas.

MARY K. WALL